

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

RAMON MANRIQUEZ-NUNEZ,

Defendant.

CASE NO. CR-15-6026-EFS

**ORDER GRANTING DEFENDANT'S MOTION
TO DISMISS THE INDICTMENT**

A hearing occurred in the above-captioned matter on December 1, 2015. Defendant Ramon Manriquez-Nunez was present, represented by Alison Guernsey, and assisted by a Spanish-speaking interpreter. Shawn Anderson appeared on the U.S. Attorney's Office's (USAO) behalf. The Court heard argument on Defendant's Motion to Dismiss, ECF No. 25, after reviewing the briefing and relevant legal authority. Defendant seeks dismissal of the indictment, which charges him with being an Alien in the United States after Deportation under 8 U.S.C. § 1326, on the grounds that the deportation on which it relies violated his due-process rights because the immigration judge failed to secure a knowing, intelligent, and voluntary waiver of the right to counsel and to advise Defendant of his eligibility for relief from removal, and these failures prejudiced Defendant as he could have sought voluntary removal in lieu of entry of an order of deportation. The USAO opposes the motion: although recognizing that the immigration judge failed to

1 advise Defendant of his right to seek voluntary removal, the USAO
2 maintains that the immigration judge secured a knowing, intelligent,
3 and voluntary waiver of Defendant's right to retain counsel and that
4 Defendant was not prejudiced by not being told that he had a right to
5 seek voluntary removal because there was no plausible path to relief
6 from removal for Defendant. This Order supplements and memorializes
7 the Court's oral ruling granting Defendant's motion to dismiss.

8 **A. Background**

9 On March 26, 2007, the Immigration and Naturalization Service
10 issued Defendant a Notice to Appear, alleging that he was subject to
11 deportation because he was not a citizen of the United States, had
12 entered the United States without permission, and had been convicted
13 of vehicular assault and third-degree assault in violation of
14 Washington law. ECF No. 25, Ex. A. The Notice to Appear also alleged
15 that Defendant was subject to removal as an alien who had entered the
16 United States without being formally admitted and committed a crime
17 involving moral turpitude. *Id.*

18 On August 16, 2007, Defendant appeared before an immigration
19 judge in response to the Notice to Appear. ECF No. 25, Exs. B & C.
20 Five other aliens also appeared at the group hearing before the
21 immigration judge, and a Spanish-speaking interpreter assisted the six
22 aliens. The immigration judge swore the aliens in as a group and then
23 mentioned that earlier that day he had told all of them about their
24 rights, including: "I told you that you have the right to be
25 represented by counsel of your choice." ECF No. 25, Ex. C at 3:24-25.
26 All aliens agreed in a group fashion that was correct. Then the

1 immigration judge stated, "You all waived the right to be represented
2 by counsel of your choice." Neither the transcript nor the oral
3 recording clearly identifies that Defendant confirmed or answered
4 "yes" to this statement.

5 A series of other questions ensued with group answers in
6 response, and then the immigration judge addressed Defendant
7 individually stating, "it is my order that you be ordered removed from
8 the United States to Mexico. Do you wish to accept my decision or do
9 you want to appeal my decision." ECF No. 25, Ex. C at 5:10-11.
10 Defendant stated, "I accept." *Id.* at 5:12. Counsel for the government
11 then advised the immigration judge that the government was withdrawing
12 the "CIMT [crime involving moral turpitude] charge," and the
13 immigration judge accepted this withdrawal but still determined that
14 Defendant was removable. *Id.* at 5:13-24.

15 On August 18, 2007, Defendant was physically removed from the
16 United States. Sometime thereafter, Defendant reentered the United
17 States and was apprehended. The 2007 removal order was reinstated.
18 Defendant was removed from the United States on January 6, 2014.

19 On July 20, 2015, Defendant was found in the Eastern District of
20 Washington. ECF No. 13. The instant indictment charging Defendant with
21 being an Alien in the United States after Deportation was filed on
22 August 18, 2015. Defendant thereafter filed this motion to dismiss.

23 **B. Authority and Analysis**

24 The Fifth Amendment's due process clause affords a criminal
25 defendant charged with violating 8 U.S.C. § 1326 with an opportunity
26 to seek judicial review of the underlying deportation. *United States*

1 *v. Zarate-Martinez*, 133 F.3d 1994, 1197 (9th Cir. 1998), *overruled on*
2 *other grounds by United States v. Corona-Sanchez*, 291 F.3d 1201 (9th
3 Cir. 2002). To collaterally attack the deportation order underlying a
4 § 1326 criminal proceeding, the defendant must show:

- 5 (1) the alien exhausted any administrative remedies that
6 may have been available to seek relief against the order;
7 (2) the deportation proceedings at which the order was
8 issued improperly deprived the alien of the opportunity for
9 judicial review; and
10 (3) the entry of the order was fundamentally unfair.

11 8 U.S.C. § 1326(d). The first two requirements—exhaustion and improper
12 denial of judicial review—are satisfied if the defendant establishes
13 that the immigration judge improperly failed to inform him of his
14 eligibility for relief. *United States v. Arias-Ordonez*, 597 F.3d 972,
15 977 (9th Cir. 2010). The third requirement (entry of the order was
16 fundamentally unfair) can be met by showing that 1) the defendant's
17 due-process rights were violated during the underlying deportation
18 proceeding, and 2) he suffered prejudice as a result. *See, e.g.,*
19 *United States v. Ramon*, 623 F.3d 672, 680 (9th Cir. 2010); *United*
20 *States v. Leon-Leon*, 35 F.3d 1428, 1431 (9th Cir. 1994).

21 The USAO does not contest that Defendant satisfies the first two
22 § 1326(d) requirements because the immigration judge failed to advise
23 Defendant that he could seek relief from deportation through voluntary
24 removal. *See Arias-Ordonez*, 597 F.3d at 977 ("Our circuit law is also
25 well established that § 1326(d)'s requirements of exhaustion and
26 deprivation of judicial review are satisfied when the government
misinforms an alien that he is ineligible for relief."); *United States*
v. Gonzalez-Flores, 804 F.3d 920, 927 (9th Cir. 2015) (recognizing

1 that an alien need not prove exhaustion of administrative remedies if
2 the alien did not have the ability to knowingly and intelligently
3 waive the right to an administrative appeal). Defendant was eligible
4 for pre-hearing voluntary departure, as he did not have an aggravated-
5 felony conviction and he was not removable under the terrorist
6 provisions. See 8 U.S.C. § 1101(43) & 1229c(a)(1). Therefore, because
7 the immigration judge failed to advise him of his right to seek
8 voluntary departure, § 1326(d)'s requirements of exhaustion and
9 deprivation of judicial review are satisfied.

10 Accordingly, the focus is on whether entry of the 2007 Order of
11 Removal was fundamentally unfair. This question requires the Court to
12 consider whether the Defendant has shown that his due-process rights
13 were violated during the underlying deportation proceeding and that he
14 suffered prejudice as a result of this due-process violation. As
15 mentioned above, the USAO does not contest that Defendant's due-
16 process rights were violated because the immigration judge failed to
17 advise Defendant that he could seek relief from entry of an order of
18 deportation through voluntary removal. The USAO does contest
19 Defendant's argument that his due-process rights were violated by the
20 immigration judge failing to individually assess whether Defendant
21 knowingly and voluntarily waived his right to be represented by
22 counsel at no expense to the government.

23 The Court finds the immigration judge violated Defendant's due-
24 process rights both by failing to advise him of his right to seek
25 voluntary departure (uncontested) and to ensure that his waiver of his
26 right to retain counsel was knowing and intelligent (contested). In

1 regard to the right to retain counsel, the immigration judge failed to
2 inquire with each alien as to whether he wished to be represented by
3 counsel. An alien has the right to be represented by counsel at no
4 expense to the government during immigration proceedings, see 8 U.S.C.
5 § 1362, and this right stems also from the Fifth Amendment's guarantee
6 of due process. *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir.
7 2004). An immigration judge is required at a minimum to 1) inquire
8 whether the alien wishes counsel, 2) determine a reasonable period for
9 the alien to obtain counsel, and 3) assess whether any waiver of the
10 right to counsel by the alien is knowing and voluntary. *United States*
11 *v. Ramos*, 623 F.3d 672, 683 (9th Cir. 2010). Here, the record merely
12 establishes that the immigration judge informed Defendant of his right
13 to counsel in a group fashion; the record does not establish that the
14 immigration judge assessed whether Defendant's waiver of his right to
15 counsel was knowing and intelligent. The immigration judge did not
16 engage in a specific exchange with Defendant regarding his purported
17 decision to waive counsel, such as discussing the implications of
18 proceeding without counsel. Accordingly, the Court finds that
19 Defendant's purported waiver of the right to counsel was not
20 constitutionally sound and therefore his 2007 order of removal
21 violated his due-process rights.

22 Having determined that the 2007 order of removal violated
23 Defendant's due-process rights, the next inquiry is whether Defendant
24 suffered prejudice as a result. Defendant must show there were
25 plausible grounds on which he could have been granted relief from
26 removal in 2007. See *United States v. Reyes-Bonilla*, 671 F.3d 1036,

1 1049 (2012) (focusing the analysis on the time period that removal
2 occurred). Defendant need not conclusively show that he would have
3 been provided relief but must show more than a theoretical possibility
4 of relief. See *id.* at 1049-50. When exercising his discretion to
5 determine whether to grant an alien's motion for voluntary departure,
6 the immigration judge is required to evaluate the "favorable and
7 unfavorable facts" relevant to the decision. *Campos-Granillo v. INS*,
8 12 F.3d 849, 852 (9th Cir. 1993). Factors to consider include the
9 alien's prior immigration history, the nature of his entry, violations
10 of immigration and other laws, length in the United States, family
11 ties to the United States, and humanitarian needs. *Campos-Granillos v.*
12 *INS*, 12 F.3d 849, 852 (9th Cir. 1993). And then the court assesses
13 whether Defendant showed that "aliens with similar circumstances
14 received relief." *United States v. Gonzalez-Flores*, 804 F.3d 920, 928
15 (9th Cir. 2015) (quoting *United States v. Rojas-Pedroza*, 716 F.3d
16 1253, 1263 (9th Cir. 2013)).

17 Although a close analytical question for the Court, the Court
18 finds, after balancing the positive and negative equities in light of
19 other immigration cases, that Defendant has shown that at the time the
20 order of removal was entered the immigration judge could have
21 reasonably determined that Defendant's positive factors outweighed his
22 negative factors. First, as to the positive factors in 2007, Defendant
23 had been in the United States for fifteen years, arriving in the
24 United States when he was approximately fifteen years old, and had
25 been working on a steady basis since his arrival to the United States.
26 He was in a 10-year relationship with his girlfriend and mother of his

1 two children, all of whom are U.S. citizens. His parents, a brother,
2 and sister were living in the United States. Defendant also had a
3 mental-health condition that would have been considered as a positive
4 equity in the plausibility analysis. Negative factors included that
5 Defendant had a criminal conviction for vehicular assault and assault
6 in the third degree, arising from same incident, and he was present in
7 the United States without permission and under a false name. After
8 balancing these factors, the Court concludes that an immigration judge
9 could have determined that the positive factors outweighed the
10 negative factors at the time of the underlying immigration proceeding.
11 *See In re Gonzales-Figeroa*, A29013696, 2006 WL 729784 (BIA Feb. 10,
12 2006); *In re Pineda-Castellanos*, A77212443, 2005 WL 3833024 (BIA Nov.
13 16, 2005); and *In re Reyes Jimenez*, A97341646, 2004 WL 2418597 (BIA
14 Oct. 4, 2004).

15 Accordingly, the Court grants Defendant's Motion to Dismiss the
16 indictment because Defendant's due-process rights were violated during
17 the immigration proceeding and he suffered prejudice as a result,
18 leading to the entry of the Order of Removal.

19 **C. Conclusion**

20 For the above-given reasons, **IT IS HEREBY ORDERED:**

- 21 1. Defendant's Motion to Dismiss, **ECF No. 25**, is **GRANTED**.
- 22 2. The Indictment, **ECF No. 13**, is **DISMISSED**.
- 23 3. Trial and all pending dates and deadlines are **STRICKEN**.
- 24 4. Defendant shall be **RELEASED** from U.S. Marshal's custody.

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1 5. This case shall be **CLOSED**.

2 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this
3 Order and provide copies to all counsel, the U.S. Probation Office,
4 and the U.S. Marshal's Office.

5 **DATED** this 1ST day of December 2015.

6
7 s/Edward F. Shea

 EDWARD F. SHEA
8 Senior United States District Judge
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